A

NG SZE BUI

v.

PP

B

HIGH COURT SABAH & SARAWAK, KUCHING
DAVID WONG DAK WAH J
[CRIMINAL APPEAL NO: 42-33-2007-III]
30 JULY 2008

C ***CRIMINAL PROCEDURE:*** *Appeal - Conviction and sentence, against - Appellant found guilty of stabbing deceased - Whether there was direct evidence to show appellant had dealt the fatal stab - Whether charge against appellant should be set aside - Penal Code, s. 325*

D The appellant was convicted for the crime of manslaughter by causing the death of one Yoon Boon Yaw (deceased) and was sentenced to ten years imprisonment. The appellant appealed to this court against his conviction and sentence while the respondent, in a cross appeal, appealed against the inadequacy of the sentence. Briefly, on 15 January 2002, the deceased and his E mistress (PW7) were confronted by the wife of the deceased (PW6) at the Rock Discotheque. The deceased and PW6 quarreled after which the three of them proceeded to leave the discotheque and as they were leaving, the deceased was attacked by a group of people. One of them, the appellant, was alleged to F have stabbed the deceased with a 'fighting spur' resulting in the death of the deceased. The issue that arose in this appeal was whether the learned sessions court judge had erred in concluding that it was the appellant who had dealt the fatal stab to the deceased. G

Held:

(1) From the evidence of PW6 and PW7, the deceased had sustained only one stab wound. However, the post mortem H report listed five stabs and two slash wounds on the deceased. No explanation was given by anyone as to how the deceased sustained those wounds. The learned sessions court judge should have considered this aspect of the evidence in her judgment. The multiple wounds sustained by the deceased I were consistent to a person being attacked by a group of people. The natural inference was that the wounds of the deceased were inflicted not only by the appellant. (para 12)

(2) There was no clear evidence from PW6 and PW7 as to which wound the appellant had inflicted on the deceased. The post mortem report stated that the cause of death was the stab to the heart by a sharp object but the pathologist who prepared the report was not in court to tell which wound that was. PW6 had testified that the deceased was stabbed in the chest while PW7 gave two conflicting versions, one stating that the deceased was stabbed when he was lying face down and the other in re- examination stated that the deceased was stabbed on the chest. There were two chest wounds on the deceased, one on the right and one on the left. There was no direct evidence to show that the injury inflicted by the appellant was the fatal injury as stated in the post mortem report. (para 12)

(3) The sessions court judge had failed to analyze the visual evidence of PW6 and PW7 in the context of the post mortem report. The inconsistency between the post mortem report and the visual evidence was too great to ignore when there was no explanation by anyone of the inconsistency. Further, the failure of the pathologist to attend court as a witness deprived the court the opportunity to find out which stab wound in the post mortem report was the fatal stab. (para 13)

(4) The appellant did inflict some injuries to the deceased. Even though there were inconsistencies in the evidence of PW6 and PW7 as to the fact how many persons were involved in the fight and the number of stabbing which they saw, the fact remained that both PW6 and PW7 saw the appellant stab the deceased. Whether it was a single stab as claimed by the appellant or whether it was the first stab or the second stab or so forth, the evidence clearly showed that the appellant did cause some injuries to the deceased. But for this charge to stand against the appellant, evidence must show that the appellant made the fatal stab. Here, that evidence was absent. (para 14)

(5) The charge against the appellant was hereby set aside. Instead the appellant was convicted under s. 325 of the Penal Code for causing grievous hurt to one Yong Boon Yaw on 15 January 2002 at the entrance of the Rock Discotheque by stabbing him in the body. The appellant hereby sentenced to five years imprisonment. (para 17)

[Order accordingly.]

Case(s) referred to:
Amar Singh & Ors v. State of Punjab AIR (1987) SC 826
Dzuraini Malek v. PP [2000] 1 LNS 16
Sivalingam Chelliah v. PP [1982] CLJ 406; [1982] CLJ (Rep) 330 FC

Legislation referred to:
Criminal Procedure Code, s. 399
Penal Code, s. 325

For the appellant - Shanker Ram; M/s Shankar Ram & Co
For the respondent - Amy Ling; DPP

Reported by Suhainah Wahiduddin

JUDGMENT

David Wong Dak Wah J:

Introduction

[1] The appellant, after a full trial in the Sessions Court, was convicted for the crime of manslaughter by causing the death of Yoon Boon Yaw (deceased) and was sentenced to ten years imprisonment. The appellant appealed to this court against his conviction and sentence while the respondent, in a cross appeal, appealed against the inadequacy of the sentence.

Facts Of The Case

[2] On that fateful morning of 15 January 2002, the deceased and his mistress (PW7) were confronted by the deceased's wife (PW6) at the Rock Discotheque. There PW6 alleged that she was slapped and pushed by her husband, the deceased. This was denied by PW7 who said the deceased never slapped PW6 but only pushed her. After the quarrel between the deceased and PW6, the three of them proceeded to leave the discotheque and as they were leaving, the deceased was attacked by a group of people. One of them, the appellant was alleged to have stabbed the deceased with a "fighting spur" resulting in the death of the deceased.

Petition Of Appeal

[3] The appellant listed 15 grounds of grievances. However after perusing them and having heard submissions from learned counsels, it is my view that this appeal can be disposed off by deliberating on the following issue:

> Whether or not the learned Sessions Court Judge had erred in concluding that it was the Appellant who had dealt the fatal stab to the deceased?

[4] As rightly pointed out by the learned Sessions Court Judge, for the charge of manslaughter to sustain, the prosecution needed to prove beyond reasonable doubt three ingredients, that is:

(i) That the accused had inflicted injuries on one Yoon Boon Yaw;

(ii) That the injuries were inflicted with the intention to cause such bodily injuries as was likely to cause the death of Yoon Boon Yaw;

(iii) Yoon Boon Yaw died from the injuries inflicted.

[5] I have no doubt in my mind that ingredient (i) had been proven by the prosecution.

[6] I now deal with ingredients (ii) and (iii). In proving its case the prosecution produced the post mortem report through the Assistant Investigating Officer without calling the maker under s. 399 of the Criminal Procedure Code. This was not objected to by the defense. Nor did the Court see it fit to call the maker. From the post mortem report, the deceased sustained the following injuries:

Stab wounds on body:

1) A stab wound on right side of chest

Site:	On right side of chest 3 cm away from vertical midline of body and 5 cm above line joining two nipples.
Size:	1.8 cm x 0.8 cm x muscle deep.
Shape:	Spindle shaped.
Position:	Oblique.

	Direction in depth:	Obliquely Going deep inside from medial to lateral and below to upward.
	Margins:	Smooth and clean.
	Angles:	Sharp.

2) A stab wound on left side of chest

Site:	On lower part of left side chest, 2 cm away from vertical midline of body and 7 cm below line joining two nipples
Size:	2.3 cm x 1 cm x 7 cm deep.
Shape:	Spindle.
Position:	Oblique
Direction in depth:	From below going upward obliquely.
Margins:	Smooth and clean.
Angles:	Sharp.
Other:	Left side lower ribs are seen cut through

3) A slash wound on left deltoid muscle

Site:	On left deltoid muscle involving anterior and lateral sides
Size:	16 cm x 3 cm x Muscle deep.
Shape:	Long spindle shaped.
Position:	Oblique
Direction in depth:	Straight in side
Margins:	Clean and smooth.
Angles:	Sharp
Other:	Muscles and small vessels are cut.

4) A stab wound on left side upper arm

Site:	Left upper arm on anterior aspect below wound no: 3
Size:	2.2 cm x 1 cm x 2 cm (Muscle deep)
Shape:	Angulated curved spindle
Position:	Oblique
Direction in depth:	Oblique
Margins:	Clean and smooth
Angles:	Sharp
Other:	-

5) A stab wound on back of neck

Site:	On back side of lower end of neck on vertical midline of body
Size:	3 cm x 0.5 cm x 2 cm
Shape:	Thin narrow spindle
Position:	Slightly oblique
Direction in depth:	From Above to down oblique
Margins:	Smooth and clean
Angles:	Sharp
Other:	-

6) A stab wound on back of chest

Site:	On left side scapular bone region. 10 cm from vertical midline of body and 11 cm below upper margin of shoulder
Size:	2 cm x 1 cm x 2 cm
Shape:	Irregular
Position:	Oblique
Direction in depth:	Above to down ward
Margins:	Clean and smooth
Angles:	Sharp
Other:	-

7) A slash wound on right upper limb

Site:	On right triceps muscle 15 cm above elbow.
Size:	4 cm x 1 cm x fatty tissue deep
Shape:	Spindle
Position:	Oblique
Direction in depth:	Slight oblique
Margins:	Clean and smooth
Angles:	Sharp
Other:	-

[7] The question which I need to ask myself now is whether the deceased's wounds as set out in the post mortem report are consistent to the visual evidence of PW3, PW6 and PW7. If they are not or cannot be explained the prosecution would have failed to prove beyond reasonable doubt that the injuries inflicted by the appellant had caused the death of the deceased.

[8] The post mortem report stated the cause of death as:

> Extensive hemopericardium due to penetrating stab wound in heart by sharp object.

[9] In plain language the deceased died due to excessive bleeding from a stab wound to the heart with a sharp object.

[10] Mr. Shankar Ram, counsel for the appellant, submitted that the difference between the visual evidence and the post mortem report is that on the one hand the visual evidence of PW6 and PW7 points to only one stab wound by the appellant while the post mortem report listed out five stab wounds without any explanation as to how the deceased sustained the other stabs wounds. This difference, in his view, makes the conviction highly unsafe and he referred the Court to the several Indian cases but suffice for me to quote the case of *Amar Singh and Others v. State of Punjab* AIR (1987) Supreme Court 826 where the court at pp. 828-829 held:

> Thus the evidence of PW5 is totally inconsistent with the medical evidence. This Court in Ram Narain v State of Punjab AIR 1975 SC 1727; (1975 Cri LJ 1500) has laid down that if the evidence of the witnesses for the prosecution is totally inconsistent with the medical evidence, this is a most fundamental defect in the prosecution case and unless reasonably explained, it is sufficient to discredit the entire case. There is no explanation for the apparent total inconsistency between the evidence of PW5 and the medical evidence.

[11] I have no doubt that what is stated in the just quoted case is a correct statement of an evidential principle.

[12] Looking at the evidence in its totality, I am of the view that the prosecution had failed to discharge its burden of proof in proving that it was the appellant who had inflicted those injuries which had caused the death of the deceased and my reasons are:-

1. From the evidence of PW6 and PW7, it appears that the deceased had sustained only one stab wound.

   The relevant evidence of PW6 is this: "When I descend the discotheque I saw the accused person stabbed my husband with a fighting spur … After the accused stabbed my husband he ran away from that place … (in Cross) After that my

husband came down the staircase and the accused stabbed him on his chest. It happened very fast. After that the accused escaped."

As for PW7 this is what she said: "I was an eye witness. I saw three persons kicking the deceased when he has fallen on the ground. I tried to pull them apart. Suddenly the accused person (pointing to the accused in the dock) rushed in and stabbed the accused … Yes I saw the accused stabbed the deceased. He was the only one who stabbed the deceased. When I saw the accused at that time the place was well lighted and there was street lights and near the car park."

2. The post mortem report listed five stabs and two slash wounds on the deceased. No explanation was given by anyone as to how the deceased sustained those wounds. With respect, the learned Sessions Court Judge should have considered this aspect of the evidence in her judgment. The multiple wounds sustained by the deceased are consistent to a person being attacked by a group of people. And if this is so and the evidence of a single stab wound is accepted (which the court must accept as it is the evidence of the prosecution) then the natural inference is that the wounds of the deceased were inflicted not only by the appellant.

3. Following from that there is no clear evidence from PW6 and PW7 as to which wound the appellant had inflicted on the deceased. The post mortem report stated that the cause of death was the stab to the heart by sharp object but the pathologist who prepared the report was not in court to tell which wound was that. PW6 had testified that the deceased was stabbed in the chest while PW7 gave two conflicting versions, one stating that the deceased was stabbed when he was lying face down and the other in re examination states that the deceased was stabbed on the chest. There were two chest wounds on the deceased, one on the right and one on the left. Can the court speculate which wound did the Appellant inflict on the deceased? The answer is a resounding 'negative' one. In the case of *Dzuraini bin Malek v. PP* [2000] 1 LNS 16 the learned judge set aside a manslaughter conviction on appeal when he found that the prosecution had failed to show that it was the accused who had caused the fatal blow to the head of the deceased. Similarly in this appeal

there was no direct evidence to show that the injury inflicted by the appellant was the fatal injury as stated in the post mortem report.

4. There was no evidence from anyone as to what a "fighting spur" was. There was no description of the weapon by PW3, PW6 and PW7. The court cannot speculate the type of weapon used.

5. The reluctance of the three key eye witnesses (PW3, PW6 and PW7) to tell the whole story did not help the prosecution's case. In fact it creates doubt in its case. This in fact was alluded to by the learned Sessions Court Judge and this was what she said:

> Coming back to the evidence of the 2 women in this case, there is no doubt in my mind that the deceased's wife was not giving a full version of what happened that night in respect of the events leading to the killing of her husband. She firstly denied there was a fight between her and her husband. The mistress said there was. Likewise the mistress girlfriend, one Freda Jau. I accept that indeed there must have been this fight between her and the deceased when she confronted his mistress and that the 3 men who interfered when he quarreled with her were actually persons known to her as well. It was therefore the wife who started the fight that led to his death and it is this part of the narrative that she conveniently left out from her evidence. Then there are some discrepancies in the 2 women's evidence about their role after the stabbing. The deceased's wife in her evidence said she tried to help him but according to his mistress, she just looked on when the deceased was kicked by the 3 men and after he was stabbed by the accused.

[13] This reluctance compounds the weakness of the prosecution's case.

6. I am mindful of the fact that the learned Sessions Court Judge had excused the inconsistencies of the evidence of PW3, PW6 and PW7 by alluding to the fact that the trial took place some five years after the incident. I have no doubt that what the learned Sessions Court Judge did was correct. But where she erred was that she failed to analyze the visual evidence of PW6 and PW7 in the context of the post mortem report. As

> stated by me earlier, the inconsistency between the post mortem report and the visual evidence is too great to ignore when there was no explanation by anyone of the inconsistency. Further the failure of the pathologist to attend court as a witness deprived the court the opportunity to find out which stab wound in the post mortem report was the fatal stab.

[14] However as I said earlier, I am satisfied that the appellant did inflict some injuries to the deceased. Even though there were inconsistencies in the evidence of PW6 and PW7 as to the fact how many persons were involved in the fight and the number of stabbing which they saw, the fact remains that both PW6 and PW7 saw the appellant stabbed the deceased. Whether it was a single stab as claimed by the appellant's counsel or whether it was the 1st stab or the 2nd stab and so forth, the evidence clearly shows that the appellant did cause some injuries to the deceased. But for this charge to stand against the appellant, evidence must show that the appellant made the fatal stab. Here that evidence is absent.

[15] That being the case, I have to consider whether or not the conviction can be substituted for a lesser offence of voluntarily causing grievous hurt. For this purpose I refer to the Federal Court case of *Sivalingam Chelliah v. PP* [1982] CLJ 406; [1982] CLJ (Rep) 330 which sets out the tests for substituting a conviction for another charge and correctly and succinctly summarized by the learned judge in the case of *Dzuraini bin Malek v. PP (supra)* as follows:

> (1) it is a case within ss 166 and 167 of the Criminal Procedure Code where the facts which will be proved will constitute one of several offences and the accused is charged with one offence but the evidence shows a different offence; (2) if the substituted charge had in fact been the original charge, the proceedings at the trial would have taken the same course and the evidence recorded would have been the same; (3) if the substituted charge was one of the charges preferred against the appellant or was an alternative charge the prosecution evidence would have been sufficient to satisfy the elements to constitute the charge and (4) the appellant's evidence must have been substantially unchanged in that the appellant's defense would have been the same.

[16] In my view this case has satisfied the above tests.

Conclusion

[17] Accordingly, the charge against the appellant is hereby set aside. Instead the appellant is convicted under s. 325 of the Penal Code for causing grievous hurt to one Yong Boon Yaw on 15 January 2002 at 1.45am at the entrance of the Rock Discotheque, Jalan Ban Hock by stabbing him in the body. I have read and considered his mitigation from the lower court and hereby sentence the appellant to five years imprisonment which is to start running from today.